PARIMALA MUTHUSAMY & ORS

v.

PROJEK LEBUHRAYA UTARA-SELATAN

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: 23-15-1992]
2 JULY 1997

TORT: *Negligence - Highway authority, liability of - Stray cattle on highway - Fatal accident - Whether in breach of duty of care - Whether accident likely and foreseeable - Res ipsa loquitur - Applicability*

TORT: *Negligence - Highway authority, liability of - Failure to prevent breach of fencing system - Stray cattle on highway - Whether in breach of statutory duty - Whether in breach of warranty that highway is safe - Whether liable for nuisance*

TORT: *Negligence - Occupiers of land adjoining highway - Permitting cattle to trespass on highway - Liability - Whether liable for negligence - Whether saddled with unlimited liability - Whether must prove that occupier committed acts of positive misfeasance*

The plaintiffs in this case were users of the North-South Highway while the defendant is the authority responsible for the construction, management and safety of the said highway. The plantiffs had suffered injuries as a result of an accident on the highway when the car they were travelling in collided into a cow which strayed on to the highway. The plaintiffs alleged that liability for the accident must attach to the defendant, as the defendant owed them a duty of care to prevent cattle from trespassing the highway but had failed to exercise the requisite amount of care required by law to prevent the same. In the event the plaintiffs claimed from the defendant general and special damages and in addition, the first to the third plaintiffs also claimed damages for loss of dependency for the death of their dependant. The defendant denied any liability and submitted *inter alia* (i) that the accident was caused by the failure of the deceased driver to be on the lookout for animals crossing the highway (ii) that the plaintiffs should have sued the owner of the cow and not the defendant.

Held:

[1] By virtue of the Novation Agreement entered into between the Government of Malaysia, United Engineers (Malaysia) Bhd and the defendant, the defendant was assigned the liabilities and obligations, *inter alia*, of maintaining the highway and supervising the comfort and safety of road users. The defendant cannot escape liability for its fault thereof.

[2] The duty to take care hinges on the foreseeability of the event which is called into question and the likelihood of such an event causing injury to one's neighbour. The test as to the degree or standard of care is always objective.

[2a] A reasonable man in this case would be able to anticipate that cars would be driven at some speed when using the highway. It is also fair to assume that no driver would expect an animal, let alone a huge cow, to cross his path on a sophisticated highway run by an established company. And thus, if a cow were to stray on the highway, not only was it foreseeable that a collision would occur, but injury or death would almost be a certainty.

[2b] The facts also showed that the area of the accident has experienced broken fences before where animals have escaped and strayed on to the road. This being so, the defendant ought to have taken extra measures or given special attention to that spot to alleviate any disaster. Clearly, if barbed wires or other obstacles were placed there, the debacle could have been prevented. On the facts it would be impossible to deny the defendant's negligence.

[3] A driver of a motor car travelling along a main highway such as the North-South Highway is under no obligation to look out for man or animals darting across his path.

[4] The responsibility of preventing animals straying onto the highway does not lie on the shoulders of the occupants of the adjoining lands. Certain special circumstances must exist before such occupier or owner of animal is to be held responsible. Such occupier or owner must first be shown to have committed acts of positive misfeasance before any liability could attach to them. There is no such evidence here, as it is not even known who the owner was let alone the person who breached the fence.

[4a] To accede to the defendant's submission that the plaintiffs should have instead sued the owner of the cow would tantamount to exonerating the defendant of all his liabilities and duty of care towards road users.

[5] Upon accepting the ticket at the toll gate, the deceased driver had made a contract with the defendant that the latter was to provide not only safety to him and his family but also an unhindered drive all the way to his destination. As the defendant failed to use the requisite amount of care to ensure the safety of the deceased and the plaintiffs, pursuant to the contract, it must be concluded that the warranty implied in the contract was breached.

[6] The doctrine of *res ipsa loquitur* does not apply as there is evidence to indicate why and how the accident occured. There is evidence to support the finding that the accident was due to a collision between the deceased and a stray cow which had found its way to the highway. That cow had gained access through a breach of the fencing system. This breach was due to the lackadaisical behavior of the defendant in not lighting the area, placing barbed wires, having proper surveillance of the area, having trenches or applying other measures which could easily have prevented those breaches.

[7] The plaintiffs have proved their case under a breach of duty of care as against the defendant under the sub-headings of breach of contract, breach of statutory duty and breach of common law negligence. They must therefore be held entitled to the damages they claimed. Nuisance, however, has not been proved against the defendant.

[Judgement for plaintiffs. Order accordingly.]

Cases referred to:

Penny v. The Wimbledon Urban District Council & Anor [1899] 2 QB 72 ***(cit)***
Holiday v. National Telephone Company [1899] 2 QB 392 ***(cit)***
Jones & Ors v. The Victoria Graving Dock Company [1876] 1 QBD 314 ***(cit)***
Barraclough v. Brown & Ors [1897] AC 615 ***(cit)***
Longhurst v. Metropolitan Water Board [1948] 2 All ER 834 ***(cit)***
Farr v. Butters Bros & Co [1932] 2 KB 606 ***(cit)***
Lathall v. A. Joyce and Son & Ors [1939] 3 All ER 854 ***(cit)***
Papworth v. Mayor & C of Battersea (No. 2) [1916] 1 KB 583 ***(cit)***
Lambert v. Corporation of Lowestoft [1901] 1 QB 590 ***(cit)***
Leanse v. Egerton (Lord) [1943] 1 KB 323 ***(cit)***
Blyth v. Birmingham Waterworks Co [1856] 11 Ex 781 ***(refd)***
Potts or Riddell v. Reid [1943] AC 1 ***(refd)***
Chan Loo Khee v. Lai Siew San & Ors [1971] 1 MLJ 253 ***(foll)***
Lim Kar Bee v. Abdul Latif bin Ismail [1978] 1 MLJ 109 ***(foll)***

Lochgelly Iron and Coal Company Ltd v. M'Mullan [1934] AC 23 ***(refd)***
East Suffolk Rivers Catchment Board v. Kent & Anor [1941] AC 74 ***(refd)***
Gayler and Pope Ltd v. B. Davies and Son Ltd [1924] 2 KB 75 ***(refd)***
Brock v. Richards [1951] 1 KB 529 ***(cit)***
Hughes v. Williams [1943] KB 574 ***(cit)***
Thomson v. Knights [1947] AC 336 ***(cit)***
Fitzgerald v. E.D. and A.D. Cooke Bourne (Farms) Ltd & Anor [1964] 1 QB 249 ***(cit)***
Wringe v. Cohen [1941] 1 KB 229 ***(refd)***
Searle v. Wall Bank [1947] AC 341 ***(refd)***
Heath's Garage Ltd v. Hodges [1916] 2 KB 370 ***(refd)***
Bromley v. Mercer [1922] 2 KB 126 ***(cit)***
Cox v. Coulson [1916] 2 KB 177 ***(refd)***
Maclenan v. Segar [1917] 2 KB 325 ***(refd)***
Overseas Tankship (UK) Ltd v. The Miller Steamship Co Pty & Anor [1967] AC 617 ***(cit)***
Howard and Wife v. Walker & Ors [1947] 2 All ER 197 ***(cit)***
Morley v. Dubinsky [1966] 59 DLR (2d) 217 ***(refd)***
Sedleigh-Denfield and O'Callaghan & Ors [1940] AC 880 ***(refd)***
Leanse v. Egerton (Lord) [1943] 1 KB 323 ***(refd)***

Legislation referred to:
Highway Authority Malaysia (Incorporation) Act 1980, s. 11(1)
Road Transport Act 1987, s. 88

Other source referred to:
Torts, Salmon, 16th Edn., p. 281
Negligence, Charlesworth & Percy, 9th Edn., p. 12
The Law of Tort, Winfield
Torts, Clerk & Lindsell, 10th Edn., p. 569

For the plaintiffs - E Ramasamy; M/s E Ramasamy & Co
For the defendant - Ashok K Raman; M/s Abu Talib Shahrom & Zahari

JUDGMENT

Suriyadi Halim Omar J:

The 1st plaintiff, the wife of Sellapans a/l Ramasamy (hereinafter called 'the deceased') and the 2nd, 3rd, 4th and 5th plaintiffs were passengers in a motorcar, No. BCC 2412, driven by the deceased on 6 November 1991 at about 8pm. The car had entered the highway through the Pagoh toll gate and was travelling through the north bound lane towards Ayer Keroh at the time of the accident. The deceased died on the spot after hitting a cow which had strayed on to the north bound North-South Highway at km 138.5. The 2nd and the 3rd plaintiffs are minors and are suing through their mother, the 1st plaintiff. The 5th plaintiff is also a minor, and is suing through his father,

the 6th plaintiff. The 4th plaintiff is the mother of the 1st plaintiff. The defendant is the highway authority responsible for the construction, maintenance, management and safety of the North-South Highway.

The suit originally included the Menteri Pengangkutan Malaysia, Kementerian Pengangkutan Malaysia and Kerajaan Malaysia as defendants 2 and 3 respectively. Midway through the trial the plaintiffs dropped the claims against the two defendants on the basis that by virtue of a Novation Agreement and Concession Agreement between the 1st defendant and the other two defendants, all duties and liabilities both under common law and statute had devolved upon the former (see ID 32 and 33).

Perusing the statement of claim especially from paras. 9 onwards, the plaintiffs' claim is for a breach of duty of care on the part of the defendant as against the plaintiffs who were users of the highway. Four sub-heads can be construed from the statement of claim namely that of a breach of contract and/or warranty and/or licence, nuisance, common law negligence and a breach of statutory duty as the basis of the plaintiffs' claims.

Cause Of Death

Before broaching the legal issues I propose to come to a finding of facts as to how that unfortunate incident happened. It is therefore encumbent and necessary for me to sieve and scrutinise the evidence thoroughly as parties have found it very difficult to come to any agreement on the facts and on the issue of liability. The available evidence adduced by the police are themselves not exactly of the highest quality and are at times confusing. The plaintiffs called four witnesses namely PW1, a Chief Inspector of Police who acted as the Investigating Officer on the night of the incident, PW2 the wife of the deceased who sat on the front left passenger seat, PW3 the mother of the 1st plaintiff who sat at the rear right hand side of the car and PW4 a press photographer, who contributed photographs of the scene on that fateful night. The defendant called DW1, an employee of PLUS since 1988 who was present at the scene of the accident that night, DW2 an employee of PROPEL who was also at the scene, and lastly DW3 who used to work with PLUS.

DW1 during the early part of the examination-in-chief made the statement that the fence could be breached as the people who stayed on the adjoining land had previously committed vandalism on the fence. The breach was used as an access point for them. He admitted during the trial that cows and buffaloes do pose a danger to users with many accidents involving cows in 1991 and 1992. DW2 during the cross-examination admitted that he did not know how the dead cow made its way to the road. DW3 similarly did not investigate as to how it succeeded in straying on to the highway. In fact he neither returned

to the relevant scene again nor made any repairs of any breaches in the fencing system.

At the onset I must say that PW1, the Investigating Officer of the accident who had carried out his duties very unconvincingly, aside from producing a bad sketch plan of the area, had also obtained photographs of poor quality. Regardless of the wanting quality of those neutral evidence, he did convince me that the shattered glass came from the deceased's car. He confirmed that there was another car presumably involved with that incident but with the windscreen still intact. He saw a dead cow in the middle of the road and was convinced that BCC 2412 had collided into it resulting in the car careening to the left and eventually landing at some bushy area. In his opinion it was improbable that any other cars could have knocked down that luckless cow.

PW2 the wife of the deceased was more graphic in her description of the accident when she alleged that on the night of the accident whilst sitting on the left side of the car she saw a buffalo or a cow coming suddenly from her left and straying on to the car's path. Due to the suddenness of the incident and the proximity of the animal the collision was unavoidable. She confirmed the view of PW1 that the loss of control over the car occurred after the collision and not after knocking into a tree. She lost consciousness after the collision.

PW3, the mother of PW2 who also travelled as a passenger in the car on that unfortunate night, sat at the rear side of the car. She corroborated PW2's evidence when she confirmed that while travelling on the highway, a cow crossed the road from left to right resulting in an inevitable collision. She too confirmed that due to the proximity of the cow evasive action was not possible.

PW4 who is a journalist, on the relevant date went to the scene of the accident of km. 138.5 after receiving information from a source. He successfully took some photographs albeit at a distance and tendered them as 35A-D.

From the above evidence I am satisfied that on the night in question Sellapans a/l Ramasamy who was driving vehicle BCC 2412 at km. 138.5 had collided with a stray cow that was moving from the left side of the road to the right. Due to the proximity of that animal, the deceased who was left with no room to take evasive action lost his life. The plaintiffs who were passengers suffered injuries.

Who Has Responsibility Over The Highway

Before proceeding to the legal issues regarding the sub-headings over which the plaintiffs are relying on, perhaps it will be in order if I were to refer to the Highway Authority Malaysia (Incorporation) Act 1980 now. The

introductory words of this Act reads that it is an Act to establish the Highway Authority Malaysia to supervise and execute the design, construction, regulation, operation and maintenance of inter-urban highways, to impose and collect tolls, **to enter into contracts and to provide for matters connected therewith** (emphasis supplied). For purposes of our case s. 11(1) is relevant and it reads:

> 11(1) The functions of the Authority are:
>
> (a) to supervise and execute the design, contruction and maintenance of highways as determined by the Federal Government;
>
> (b) to supervise and execute the design, construction and maintenance of rest and service areas and other facilities that may be deemed necessary along highways as determined by the Federal Government;
>
> (c) to collect toll from the users of highways and other dues from facilities along highways;
>
> (d) to plan and carry out research to ensure efficient utilisation of highways and other facilities along highways; and
>
> (e) generally to do everything for the betterment and proper use of highways and other facilities along highways.

Aside from carrying out the above statutory functions, the Highway Authority is not relieved of the responsibilities and rules which a Minister may prescribe under s. 88 of the Road Transport Act 1987 (Act 333) (especially para. (k) for purposes of this case, i.e. prohibiting animals from being on or being left unattended or not under due control on roads or any particular class of roads or on any particular road). The rules envisaged under s. 88 is generally for the purpose of regulating traffic on roads, relieving congestion and to facilitate the providing of rules and procedures to ensure the safety of road users.

By virtue of a Novation Agreement, dated 20 July 1988 made between the Government of Malaysia, United Engineers (Malaysia) Bhd. and Projek Lebuhraya Utara-Selatan Berhad (PLUS), the Government of Malaysia granted United Engineers the exclusive right and authority to undertake to enjoy the concession provided under a 18 March 1988 Concession Agreement. Pursuant to the provisions built into this Novation Agreement, with the consent of the Government, United Engineers had assigned and transferred its liabilities and obligations to PLUS. In the process it is evident that the defendant has subcontracted to PROPEL, an independent contractor, much of the surveillance responsibilities, repair works and supervising the comfort and safety of road users. Despite this act the defendant cannot escape liability as it is still liable for the fault of its independent contractor (see *Penny v. The Wimbledon Urban District Council and Another* [1899] 2 QB 72; *Holliday v. National Telephone*

Company [1899] 2 QB 392; *Jones and Others v. The Victoria Graving Dock Company* [1876] 1 QBD 314; *Barraclough v. Brown and Others* [1897] AC 615, and *Longhurst v. Metropolitan Water Board* [1948] 2 All ER 834).

Is There A Cause Of Action Against The Defendant?

As to whether a cause of action can arise for the plaintiffs on mere negligence without more, it is common knowledge among lawyers that mere negligence in itself is not a cause of action. To give a cause of action there must be negligence which amounts to a breach of duty towards the person claiming (*Farr v. Butters Bros & Co.* [1932] 2 KB 606). In the absence of scienter no liability will be placed on the shoulders of the defendant inspite of the loss and damages caused by the accident (*Lathall v. A. Joyce & Son and Others* [1939] 3 All ER 854; *Papworth v. Mayor & C., Of Battersea (No. 2)* [1916] 1 KB 583; *Lambert v. Corporation of Lowestoft* [1901] 1 QB 590 and *Leanse v. Egerton (Lord)* [1943] 1 KB 323).

But what is negligence? Suffice for me to say that *negligence is the omission to do something which a reasonable man, guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do* (*Blyth v. Birmingham Waterworks Co.* [1856] 11 Ex 781). Lord Porter on the requirement of negligence for any case in *Potts or Riddell v. Reid* [1943] AC 1 at 31 said, "Negligence is the failure to use the requisite amount of care required by the law in a case where a duty to use care exists."

It is trite law too that to succeed in this cause of action, this event must not only be foreseeable but also likely to cause injury "to the neighbour", or road user, in this case. Gill FJ in *Chan Loo Khee v. Lai Siew San & Ors.* [1971] 1 MLJ 253, at p. 258 succinctly observed that:

> It would seem clear from the authorities that the duty to take care hinges on the foreseeability of the event which is called into question and the likelihood of such an event causing injury to one's neighbour as defined by Lord Atkin in *Donoghue v. Stevenson,* and that the test as to the degree or standard of care is always objective. This means that if in the eyes of the hypothetical reasonable man of ordinary intelligence and experience a motor accident is the foreseeable result of the act or omission complained of, and it is likely to injure some one who is so closely or directly affected by the act or omission that he ought reasonably to be in contemplation as being so affected, then the person responsible for the act or omission is liable in damages for negligence.

Any reasonable man certainly will anticipate that cars will be driven at some speed when using the highway, and no amount of superhuman ability will save the drivers when confronted with dangers that require distance and time if any

effective evasive action is to be undertaken. It will not be assuming too much if I opine that no driver will expect an animal, let alone a huge cow at that, to cross his path on a sophisticated highway run by an established company. On the same breath it is not unreasonable for a driver to expect animals to stray cross his path if he were to drive, say along the old Melaka/Alor Gajah route; in fact not experiencing an animal crossing the road at any one time would be a rarity and an exception.

As to whether there is a duty on the part of the driver to be on the lookout for man or animals to dart across his path in a main highway, Raja Azlan Shah FJ (as he then was) in the case of *Lim Kar Bee v. Abdul Latif bin Ismail* [1978] 1 MLJ 109 especially 119 said:

> The law is content to take the cavalier view that a driver of a motor car travelling along a main highway is under no duty to be on the look-out for anybody suddenly darting out into the road in a negligent and irresponsible manner.

An offshoot of this view will be that, if a driver is under no duty or obligation to look out for anybody darting across at a main highway, similarly it is improbable that any duty exist on the driver as regards animals especially on the North-South Highway. To regurgitate, if any cow (with the foreknowledge that cows do grass around that area) were to stray on the highway, not only is it foreseeable that a collision will occur, but injury or death is the near certain outcome. It does not need a car to be driven at 110kph or above to result in death. As in this case eventhough the deceased was only driving at 80kph, as asserted by PW2 in a 110kph speed limit zone, the outcome was still catastrophic.

By virtue of the fact that this suit is statute based, the case of *Lochgelly Iron and Coal Company, Limited v. M'Mullan* [1934] AC 23 is relevant, in particular the remarks of Lord Wright, when he said:

> ... the cause of action is complete on proof of breach of the statutory duty, ... In such a case as the present the liability is something which goes beyond and is on a different plane from the liability for breach of a duty under the ordinary law, apart from the statute, because not only is the duty one which cannot be delegated but, whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute. But the duty is the same in kind in this respect, that it is a duty to take precautions and care ... it is a duty to take care which is owed ... and which if broken constitutes negligent conduct, for which, if damage ensues ... damages are recoverable. Hence the breach of such a duty as that in question has been, I think, correctly described as statutory negligence.

Lord Atkin in *East Suffolk Rivers Cathment Board v. Kent and Another* [1941] AC 74 at 88 said:

> As a rule the statutory duty involves the notion of taking care not to injure and in such cases actions for breach of statutory duty come within the category of negligence.

Further at p. 90 he said:

> I treat it, therefore, as established that a public authority, whether doing an act which it is its duty to do, or doing an act which it is merely empowered to do, must in doing the act do it without negligence, or, as it is put in some of the cases, must not do it carelessly or improperly.

It is my finding of fact that that area has experienced broken fences where animals have escaped and strayed on to the road. Inspite of that knowledge and being aware of the potential dangers, the defendant had not found it fit either to take extra measures or give special attention to that spot to alleviate any disaster. This inaction is perhaps founded on the belief, as asserted by DW1, that the responsibility of preventing animals from straying on to the highway lay on the shoulders of the occupants of the adjoining land. The unfortunate death of the driver of this case which left the children fatherless and with a possible legacy of a bleak future is the disastrous outcome of a misconceived belief and attitude.

It is perhaps not too presumptious for the Court to conclude that it is due to this attitude that no serious or extra precaution was accorded to that area to ensure a breachproof fencing system. It was only after 1991 that barbed wires were placed around that area; even that too was for the purpose of preventing trespassers from entering the highway. By some strange deduction the dangers of animals to road users never seemed to loom large in the agenda of the defendant! From these facts I must assume that on that material day the fence was breached again, and as there was no barbed wires or other obstacles placed there, that dead cow had found its way to the highway through that gap. Had the barbed wires been placed there earlier, the debacle could have been prevented. For that matter the locals from the adjoining land would have been dissuaded from breaching the fencing system, merely to create a short cut, by the very sight of the intimidating barbed wires.

Due to the stance of DW1 it is only proper that I make some comments pertaining to this issue ie, whether the plaintiff should have sued the owner of the cow and to exonerate the defendant. In *Gayler and Pope, Limited v. B. Davies and Son, Limited* [1924] 2 KB 75 it was held that the unexplained trespass of an animal from the highway on to the adjoining land was *prima facie* evidence. Whether animals escaping from adjoining premises will give

rise to an action if there is negligence sometimes is not very clear (*Brock v. Richards* [1951] 1 KB 529; *Hughes v. Williams* [1943] KB 574, 576; *Thomson v. Knights* [1947] AC 336, 341 and *Fitzgerald v. E.D. and A.D. Cooke Bourne (Farms) Ltd. and Another* [1964] 1 QB 249). *Salmon On Torts* (16th Edn.) at p. 281 after referring to *Wringe v. Cohen* [1941] 1 KB 229 wrote:

> The occupier is liable, of course, for acts of positive misfeasance whereby he obstructs the highway or renders it dangerous, and he is also liable for maintaining his adjoining premises in such a dangerous condition as to constitute a nuisance to the highway.

In the case of *Searle v. Wall Bank* [1947] AC 341 the Court did not view that the owner was outright negligent if an animal escaped unless he accompanied the animal and damages occur after the animal had escaped. In other words certain special circumstances will have to exist before an owner is to be held responsible.

Going by these cases, it would appear that for the owner of the cow to be responsible, the owner must have committed acts of positive misfeasance. Here we do not even know the owner of the cow, let alone the person who breached the fence, which resulted in the cow having access to the highway. For all we know the culprit who breached the fence may not be the owner of the cow, with him having absolutely no idea of the existence of that breach. Even if the blameless owner can be identified his only fault may only be to own an active cow which by its very nature has a propensity to be very mobile. In the case of *Heath's Garage, Limited v. Hodges* [1916] 2 KB 370 the Court held that an owner or occupier of land adjoining an ordinary highway was not bound to fence it so as to prevent harmless animals like sheep from straying upon the highway. According to the Court it will be a very sad day when farmers become liable to unlimited liability in case of inadvertently or even wilfully permitting their cattle to trespass on the highway. As against this, we have the defendant who has undertaken to ensure the safety of the highway, and who will be paid for that promise when a contract was sealed the moment the deceased accepted the ticket at the toll gate. As far as the deceased was concerned he made a pact with the defendant in that the latter was to provide not only safety to him and his family but also an unhindered drive all the way to his destination. To accede to the submission of the defendant that the plaintiff should have instead sued the owner of the cow would tantamount to exonerating the defendant of all his liabilities and duty of care towards any road user. To use the colloquial term, it is as good as allowing him to push the bucket to a third party.

With the available facts it would have been impossible for me to deny the defendant's negligence. Eventhough the defendant's inaction was not based on the desire to produce the accident, yet it actually produced that unwanton result by virtue of the administrative carelessness or indifference to the lurking dangers eventhough without design. I view this lackadaisical attitude unacceptable in the light of the previous acquired knowledge that this was a troublesome spot. The area too was still left unlit without any extra precaution taken to ensure a that no untoward incident occurred.

Contract

On the sub-basis of contract which the plaintiffs have asserted in the Statement of Claim, the views of Charlesworth & Percy on *Negligence* 9th Edn. at p. 12 are relevant. Here the writer opined:

> A duty to take care can be imposed by law or can be created by contract or trust. The breach of the contractual duty to take care, however is not negligence in the sense in which the word is now being used. It is not uncommon to speak of the negligent performance of a contract but that in that case the word "negligent" is used in the second meaning explained above i.e. in the sense of careless ... **but it is now well recognised that breach of a contractual duty must be dealt with according to the law of contract, and cannot be regarded as a tort of negligence ...** (emphasis supplied).

It is my understanding of the law that the moment a ticket is extracted at the toll gate, as in this case, and the highway is used, a contract is thus struck between the parties, making the plaintiff a lawful user of the road (*Bromley v. Mercer* [1922] 2 KB 126). Undoubtedly if the driver sustains injuries due to his own negligence, no amount of persuasion will convince the Court to hold the defendant liable. On the other hand if the latter has been careless in its duty to keep up to its bargain to maintain a good and safe road, barring unforeseen circumstances e.g. acts of God, then the defendant cannot escape that responsibility and may be held liable. I am in total agreement with the submission of the learned Counsel of the plaintiffs that, built into the contract, is the implied term or warranty that the said highway will be safe for use by the deceased and his passengers. There will be an expectation that:

1. that the plaintiffs' usage of the highway will be without any hinderance, obstruction and without risking any bodily injury or damage to the car;

2. that an effective fencing system will be erected to ensure that animals will be prevented from straying on to the highway;

3. in the event the fencing system is breached repairs will be carried out promptly before any untoward incidents occur;

4. sufficient warning is given to road users of any impending danger on the highway; and

5. generally to ensure that an effective system of control management have been set up to ensure that the safety of road users are guaranteed.

In the case of *Cox v. Coulson* [1916] 2 KB 177 the plaintiff went to see a performance in a theatre, and during the show an actor fired a pistol which by some unexplained reason fired a live bullet instead of a blank. The plaintiff was injured. He sued the defendant who was the lessee and manager of that theatre. Swinfen Eady LJ at p. 181 said:

> If the defendant is under any liability it **must arise out of the contract** (my emphasis) which was made when, having held out by means of the playbill an invitation to his theatre, he issued a ticket to the plaintiff and received her 9d ...
>
> The defendant must also be taken to have contracted to take due care that the premises should be reasonably safe for persons using them in the customary manner and with reasonable care: *Francis v. Cockrell* LR 5 QB 184; *Norman v. Great Western Ry. Co.* [1915] 1 KB 584.

In *Maclenan v. Segar* [1917] 2 KB 325 especially p. 332 McCardie J said:

> Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains **an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them.** ...

To avoid any risk of repetition I will merely say that the above findings of fact is applicable under this sub-heading. As the defendant failed to use the requisite amount of care to ensure the safety of the deceased and the plaintiffs, pursuant to the contract, I am satisfied by virtue of the careless behaviour of the defendant that the implied warranty was breached.

Nuisance

Nuisance is a term used to cover a wide variety of tortuous acts or omissions and may not be capable of any legal definition as its definition will depend on the surrounding circumstances. What is trite is that negligence is not an essential element in determining liability for nuisance although fault of some kind is almost always necessary; fault generally involves foreseeability (*Overseas Tankship (U.K.) Ltd. and The Miller Steamship Co. Pty. and Another* [1967] AC 617).

There is sufficient authority to say that if a person's right of free passage or of some rights connected therewith has been the subject of interference he is endowed with the right to take up a nuisance action (see *Howard and Wife v. Walker and Others* [1947] 2 All ER 197 and *Winfield's Textbook on The Law Of Tort.*

The plaintiffs' Counsel in his submission when highlighting this interference have somewhat relied on the maxim of *res ipsa loquitur.* Clerk and Lindsell on *Torts* 10th Edn. at p. 569 in the course of discussing *Morley v. Dubinsky* [1966] 59 DLR (2d) 217 said that the doctrine of *res ipsa loquitur* in its very nature can only apply to negligence liability. The writer further opined:

> In so far as nuisance rests on negligence, it can apply to nuisance also. The doctrine applies when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loguitur* is inappropriate, for the question of the defendant's negligence must be determined on that evidence.

On the basis of the above pre-conditions, I must thus conclude that the doctrine of *res ipsa loquitur* is inappropriate for the moment as there is evidence to indicate why or how the incident occurred. There is evidence to support the finding that the accident was due to a collision between the deceased and a stray cow which had found its way to the highway. That cow had gained access through a breach in the fencing system. This breach as said much earlier, was due to the lackadaisical behaviour of the defendant of not lighting that area, placing barbed wires, having proper surveillance of the area, having trenches or applying any other measures which could have easily prevented those breaches. In simple terms by being able to determine how or why the incident happened, the approach of the plaintiff to apply the doctrine of *res ipsa loguitur* is unacceptable.

Lord Romer in the case of *Sedleigh-Denfield and O'Callaghan and Others* [1940] AC 880, 913 laid down the proposition that:

> But an occupier of land upon which a nuisance has been created by another person is liable if he "continues" the nuisance. What acts or omissions on his part are sufficient to constitute a continuance of the nuisance is a question that probably does not admit of a comprehensive answer. But I agree with my noble and learned friend upon the woolsack, whose opinion I have had the privilege

> of reading, that the occupier "continues" a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so.

In *Leanse v. Egerton (Lord)* [1943] 1 KB 323 the plaintiff while walking on the highway was injured by glass falling from a window in an unoccupied house belonging to the defendant. The office of the defendant's agents was shut on Saturday and Sunday, and as it was difficult to obtain labour during the weekend no steps were taken to remedy the risk to passers-by until the coming Wednesday. The unfortunate incident happened during that span of time. The relevancy of this case *vis-a-vis* the current case comes across by virtue of the succinct summary made under **held** which reads:

> that the defendant had presumed knowledge of the existence of the nuisance, that he had failed to take reasonable steps to bring it to an end although he had ample time to do so, and that, therefore, he had "continued" it and was liable to the plaintiff.

To wind up my finding under this sub-heading of nuisance I have to identify the nuisance which the defendant knew or is presumed to know. Having perused the evidence I cannot say for certain that the defendant knew or could be said to presume to know that at the relevant time a breach of the fence had occurred, or a cow was strolling on the highway. For that matter, it will be highly improbable for the Court to make a finding of fact that the defendant could be said to continue the nuisance, when the foreknowledge is not conclusive, let alone end it by some reasonable means. On that score the issue of foreseeability cannot even be considered. I therefore must conclude that the plaintiffs have not been successful under their alternative sub-heading of nuisance as against the defendant.

Conclusion

The plaintiffs have proven their case pursuant to a breach of duty of care as against the defendant under the sub-headings of a breach of contract, breach of a statutory duty and breach of common law negligence. I therefore order judgment as prayed.

As regards damages parties have agreed on the following quantum based on a 100% liability:

For 1st plaintiff

a) Special Damages	...	RM500
b) General Damages for injuries	...	RM2,000

c) For funeral expenses ... RM2,000

d) For bereavement ... RM10,000

For 2nd Plaintiff

General Damages ... RM700

For 3rd Plaintiff's injuries

Nil

For 4th Plaintiff's injuries

a) Special Damages ... RM250

b) General Damages ... RM3,750

For 5th Plaintiff's injuries

General Damages ... RM2,500

For 6th Plaintiff

Special Damages ... RM500

For 1st, 2nd, & 3rd plaintiffs under loss of dependency

a) Pre-trial loss for 65 months ... RM42,000

b) Post-trial loss for 67 months ... RM43,000

As to interest I order an 8% per annum interest for general damages from the date of filing of the writ ie, 27 October 1992 until the date of judgment; 4% interest per annum for special damages and pre-trial loss of dependency from the date of accident ie, 6 November 1991 until the date of judgment. There shall be an interest of 8% per annum on the whole judgment sum from the date of the judgment until the date of full payment. Costs is ordered against the defendant and is to be taxed.

Reported by WA Sharif